

CASES AND MATERIALS ON CRIMINAL LAW AND PROCEDURE

Preliminary Sixth Edition
1989

M.L. Friedland and

Kent Roach

Faculty of Law
University of Toronto

Volume One

The Criminal Process

LAW LIBRARY

APR 2 1990

UNIVERSITY OF LAW

FACULTY OF LAW LIBRARY UNIVERSITY OF TORONTO

CASES AND MATERIALS ON CRIMINAL LAW AND PROCEDURE

Preliminary Sixth Edition

1989

M.L. Friedland

and

Kent Roach

Faculty of Law

University of Toronto

Volume One

The Criminal Process

Digitized by the Internet Archive in 2018 with funding from University of Toronto

TABLE OF CONTENTS

Volume One

THE CRIMINAL PROCESS

1		INIRODUCTION TO THE CRIMINAL CODE	1
		Excerpt from Studies in Strict Liability	1
	I.	Scheme of the Criminal Code	5
	II.	The Criminal Code as Federal Legislation	5
		Excerpt from "Criminal Justice and the Division of Power in Canada"	5
		Switzman v. Elbling	9
	III.	Codification: The Criminal As a Statute	11
		Excerpt from "The Criminal Law, 1867-1967"	11
		Amato v. R.	12
		Frey v. Fedoruk	13
		Note on the Common Law Offence of Contempt of Court	15
		R. v. Heffer	17
		Papachristou et al v. City of Jacksonville	21
		R. v. Goulis	24
		R. v. Paré	27
2		THE INVESTIGATION OF CRIME	33
		Excerpt from "Constitutionalizing Disrepute: Exclusion of Evidence After <u>Therens</u> "	33
	I.	Confessions	38
		Boudreau v. The King	38

	R. v. Wray	39
	Rothman v. R.	44
	Clarkson v. R.	48
	R. v. Manninen	53
	Miranda v. Arizona	56
	Note on Questioning Suspects	58
II.	Entrapment	59
	Amato v. R.	61
	R. v. Jewitt	64
	R. v. Mack	65
	Excerpt from "Controlling Entrapment"	71
III.	Search, Seizure and Arrest	73
	Hunter v. Southam	73
	U.S. v. Leon	78
	R. v. Strachan	78
	Note on Search Powers and Reform	84
	R. v. Collins	86
	R. v. LeBeau	91
	Note on Arrest	96
IV.	Constitutional Restraints on the Investigation of Crime: A Case Study of Drunk Driving	100
	R. v. Therens	100
	R. v. Thomsen	101
	R. v. Hufsky	103
	R. v. Dyment	105

3		THE CRIMINAL TRIAL PROCESS	109
	I.	The Donald Marshall Case	109
		Note on Appeals	109
		R. v. Marshall (1972)	110
		R. v. Marshall (1983)	117
	II.	The Role of the Prosecutor and Defence Counsel	122
		Boucher v. R.	122
		Rules of Professional Conduct	123
		R. v. Bourget	123
		Note on Plea Bargaining	125
		Adgey v. R.	131
		Note on the Role of Defence Counsel	135
		Note on Ethics of Defence Advocacy	136
	III.	Pre-trial Release	141
		R. v. Thompson	142
		R. v. Bray	145
		R. v. Pugsley	146
		R. v. Kevork	147
	IV.	Classification of Offences	148
	V.	The Preliminary Hearing	150
		Patterson v. R.	150
		Caccamo v. R.	153
		R. v. Skogman	155
	VI.	Pre-Trial Publicity and Change of Venue	157
		R. v. Adams	157
		R. v. Ebsary	158

VII.	The Jury	160
	R. v. Turpin and Siddiqui	160
	Selecting the Jury	166
	R. v. Favel	166
	R. v. Hubbert	168
	R. v. Zundel	169
	Jury Unanimity	172
	Latour v. R.	172
	R. v. Isaac	173
	Thatcher v. R.	175
VIII.	Evidence and Argument Before the Jury	177
	R. v. Salmon	177
	Avon v. R.	178
	R. v. Corbett	181
IX.	Quantum and Burden of Proof	187
	Burden of Proof	187
	Woolmington v. D.P.P.	187
	R. v. Shelley	192
	R. v. Oakes	192
	R. v. Whyte	196
	R. v. Godfrey	200
	Quantum of Proof	203
	R. v. Summers	203
	R. v. Hepworth and Fearnley	204
	R. v. Lachance	205

	х.	Trial within a Reasonable Time	208
		R. v. Ebsary	208
		R. v. Conway	209
4		THE LIMITS OF THE CRIMINAL LAW	216
		Excerpt from "The Wolfenden Report"	216
		Excerpt from "The Enforcement of Morals"	218
		Excerpt from "On Liberty"	223
		Excerpt from "The Function of Criminal Law"	223
		Bowers v. Hardwick	227
	I.	Abortion	228
		R. v. Bourne	228
		R. v. Morgentaler	233
		Excerpt from "Crimes Against the Foetus"	247
	II.	Hate Propaganda	248
		R. v. Buzzanga and Durocher	250
		R. v. Zundel	253
		R. v. Keegstra	259
		R. v. Andrews	263

Volume Two

FUNDAMENTAL PRINCIPLES OF CRIMINAL LIABILITY

5		THE CRIMINAL ACT: EXTERNAL CIRCUMSTANCES OF THE OFFENCE	267
		Excerpt from "Criminal Law"	267
		R. v. Miller	267
		Excerpt from "L.R.C. Report 31, Recodifying Criminal Law"	268
		R. v. Corrier	268
		Fagan v. Commissioner of Metropolitan Police	272
		Bratty v. A.G. for Northern Ireland	275
		R. v. Larsonneur	275
	I.	Omissions	276
		Problem	276
		Excerpt from "A Penal Code Prepared by the Indian Law Commissioners"	276
		People v. Beardsley	279
		R. v. Instan	282
		Commonwealth v. Cali	284
		R. v. Miller	285
		Horsley v. MacLaren	286
		Excerpt from "Quebec Charter of Human Rights and Freedoms"	287
		Excerpt from "Medicine and the Law - Withholding Paediatric Medical Care"	288
		R. v. Goulis	288
		R. v. Speck	289
		Excerpt from "L.R.C. Report 31, Recodifying Criminal Law"	289

II. Causation

	II.	Causation	290
		R. v. Winning	291
		R. v. Smith	293
		People v. Lewis	296
		R. v. Kitching and Adams	297
		R. v. Malcherek	298
		Excerpt from "L.R.C. Report 31, Recodifying Criminal Law"	298
		R. v. Smithers	298
		R. v. Blaue	300
		Excerpt from "Studies in Criminal Law"	301
		Excerpt from "Model Penal Code"	301
	III.	Constructive Murder	302
		Excerpt from "From Felony Murder to Accomplice Felony Attempted Murder: The Rake's Progress Compleat?"	302
		Commonwealth v. Moyer	304
		Commonwealth v. Redline	306
		Commonwealth v. Smith	308
		Pagett v. R.	315
		Excerpt from "L.R.C. Working Paper 33, Homicide"	317
		Excerpt from "L.R.C. Report 31, Recodifying Criminal Law"	321
		Vaillancourt v. R.	322
		R. v. Giff	328
6		ATTEMPT AND RELATED PROBLEMS	331
	I.	Mens Rea for an Attempt	331
	⊥ •	Lajoie v. R.	331
		111 1010 V. IV.	JJ1

viii

	R. v. Ancio	335
	R. v. Logan	339
II.	Actus Reus for an Attempt	342
	R. v. Robinson	342
	D.P.P. v. Stonehouse	346
	R. v. Barker	346
	R. v. Cline	350
	R. v. Sorrell and Bondett	353
	Deutsch v. R.	355
	Excerpt from "New Zealand Crimes Act 1961"	356
	Davey v. Lee	356
	Balogh v. Crown Court at St. Albans	356
	Excerpt from "New York Revised Penal Law"	356
	Excerpt from "A.L.I. Model Penal Code"	356
	Excerpt from "English Law Commission's Working Paper No. 50, Inchoate Offences"	356
	Excerpt from "English Criminal Attempts Act"	357
	Excerpt from "L.R.C. Report 31, Recodifying Criminal Law"	357
	Excerpt from "Should We Have a Law of Attempted Crime?"	358
	Problem	358
III.	Impossibility	359
	R. v. Scott	359
	Booth v. State of Oklahoma	360
	R. v. Donnelly	365
	R. v. Smith (Roger)	366
	Partington v. Williams	371
	Director of Public Prosecutions v. Nock	371

	<u>Dete</u>	ring v. R.	372
	Exce	rpt from "English Criminal Attempts Act"	372
	<u>Ande</u> i	rton v. Ryan	372
	<u>R.</u> v.	. Shivpuri	373
IV.		r Forms of Involvement: Counselling, Conspiracy, ng and Abetting, etc.	374
	<u>R.</u> v.	. Dungey	374
	Α.	Counselling	375
		R. v. McLeod	375
		R. v. Richard	376
	В.	Aiding and Abetting	377
		R. v. Kulbacki	377
		R. v. Salajko	379
		Dunlop and Sylvester v. R.	380
		R. v. Popen	381
		R. v. Madigan	382
		Poitras v. R.	384
		R. v. Greenlaw	387
		R. v. Meston	387
		Sokolowski v. R.	387
		Excerpt from "L.R.C. Report 31, Recodifying Criminal Law"	388
	C.	Common Intention	389
		R. v. Maier and Clark	389
		R. v. Trineer	390
		R. v. Riezebos	393
		R. v. Harris	395

	٧.	First Degree Murder	398
		Droste v. R.	398
		R. v. Stevens	398
		R. v. Nygaard	399
		R. v. Munro and Munro	399
		R. v. Collins	400
		R. v. Prevost	403
		R. v. Woods and Gruener	406
		R. v. Dollan and Newstead	406
		R. v. Paré	406
		Excerpt from "L.R.C. Report 31, Recodifying Criminal Law"	408
7		THE MENTAL STATE: REQUIREMENTS OF CULPABILITY	410
		R. v. Tolson	410
		Excerpt from "English Law Commission Working Paper No. 31, The Mental Element in Crime"	411
		Excerpt from "The Criminal Law in Canadian Society"	411
	I.	Model Penal Code and other Legislative Solutions	412
		Excerpt from "A.L.I. Model Penal Code"	412
		Excerpt from "The Model Penal Code" (Lecture by Prof. Wechsler)	413
		Excerpt from "New York Revised Penal Law"	414
		Excerpt from "English Law Commission's Working Paper No. 31, The Mental Element in Crime"	415
		Excerpt from "L.R.C. Report 31, Recodifying Criminal Law"	416
	II.	Intent	417
		R. v. Steane	417

		Dunbar v. R.	420
		Paquette v. R.	421
		R. v. George	425
	III.	Recklessness / Criminal Negligence	430
		R. v. Titchner	430
		Leblanc v. R.	432
		R. v. Caldwell	432
		R. v. Lawrence	433
		R. v. Tutton and Tutton	433
	IV.	Presumed Intent	442
		Problem	442
		D.P.P. v. Smith	442
		Parker v. R.	444
		Excerpt from "Criminal Justice Act"	444
		Hyam v. D.P.P.	445
		R. v. Hughes	445
		R. v. Tennant and Naccarato	445
		R. v. Quaranta	447
		R. v. DeWolfe	448
		R. v. Vasil	453
		R. v. Chabot	457
8		STRICT RESPONSIBILITY	458
		R. v. Ping Yuen	458
		R. v. Regina Cold Storage & Forwarding Co. Ltd.	461
		Beaver v. R.	463

	R. v. Pierce Fisheries Ltd.	473
	Excerpt from "Studies in Criminal Law"	474
	R. v. City of Sault Ste. Marie	477
	Strasser v. Roberge	482
	R. v. Chapin	483
	Reference Re Section 94(2) of the Motor Vehicle Act	484
	R. v. Metro News Ltd.	487
	Stevens v. R.	490
	Problem	492
9	MISTAKE OF FACT	495
	R. v. Prince	495
	R. v. Rees	499
	D.P.P. v. Morgan	502
	Pappajohn v. R.	503
	Sansregret v. R.	510
	Laybourn, Bulmer and Illingworth v. R.	511
	R. v. Ladue	513
	R. v. Burgess	515
	R. v. Kundeus	516
	Excerpt from "L.R.C. Report 31, Recodifying Criminal Law"	518
10	IGNORANCE OF THE LAW	520
	P v Bailov	E20
	R. v. Bailey	520
	R. v. Esop	522

	R. V. ROSS	522
	Excerpt from "The Ontario Regulations Act"	525
	Excerpt from "The Statutory Instruments Act"	525
	Molis v. R.	526
	R. ex. rel. Irwin v. Dalley	526
	R. v. Richardson	528
	R. v. Prue and Baril	528
	R. v. MacDougall	529
	Boggs v. R.	530
	R. v. Campbell and Mlynarchuk	530
	R. v. MacIntyre	536
	R. v. Maclean	536
	Excerpt from "National Security: The Legal Dimensions"	536
	R. v. Cancoil Thermal Corporation and Parkinson	537
	R. v. Howson	538
	R. v. Shymkowich	540
	Excerpt from "L.R.C. Report 31, Recodifying Criminal Law"	541
11	CORPORATE LIABILITY	543
	R. v. Fane Robinson Ltd.	543
	R. v. Andrews Weatherfoil Ltd	547
		549
	R. v. Waterloo Mercury Sales Ltd.	551
	R. v. McNamara	
	Canadian Dredge and Dock Co. Ltd. v. R.	554
	R. v. N.M. Paterson & Sons Ltd.	559

xiv

Volume Three

DEFENCES AND DISPOSITIONS

12	DRUNKENNESS	560
	Problem	560
	D.P.P. v. Beard	561
I.	Expert Evidence on Issue of Drunkenness	569
	Fisher v. R.	569
	R. v. Seguin	572
	Young v. R.	573
II.	Drunkenness and Specific Intent	574
	D.P.P. v. Majewski	574
	Leary v. R.	578
	R. v. Moreau	581
	<u>Swietlinski v. R.</u>	582
	Cooper v. R.	582
	Bernard v. R.	583
	R. v. Quinn	591
	Excerpt from "L.R.C. Report 31, Recodifying Criminal Law"	591
13	INSANTTY	593
I.	Stages of Criminal Process in Which Insanity May be Relevant	593
	A. Certification Before Trial	593
	Excerpt from "Mental Health Act" (Ontario)	593

В.	Fitness to Stand Trial	596
	Excerpt from "Criminal Code"	596
	Excerpt from "Mental Health Act"	597
	Excerpt from "Ouimet Report"	598
	Excerpt from "L.R.C. Report 31, Recodifying Criminal Law"	598
C.	Insanity as a Defence	599
	Excerpt from "Criminal Code"	599
	Excerpt from "L.R.C. Report, Mental Disorder in the Criminal Process"	600
	R. v. Saxell	600
	R. v. Swain	601
	Jones v. United States	603
D.	Who Can Raise the Insanity Issue	603
	R. v. Simpson	603
	R. v. Saxell	604
E.	Effect on a Requisite Mental State	605
	More v. R.	605
	R. v. Baltzer	606
	R. v. Wright	607
F.	Sentence	607
	Excerpt from "Enforcing the Law"	607
	Excerpt from the "Ouimet Report"	609
	Excerpt from "L.R.C. Report, Mental Disorder in the Criminal Process"	609
	R. v. Boomhower	609
	R. v. Deans	609
	Excerpt from "Criminal Code"	610

	G.	Transfer from Penal Institution to Mental Hospital	610
		Excerpt from "Criminal Code"	610
		Excerpt from "Penitentiary Act"	611
	н.	Executive Clemency	611
		Excerpt from "Report of the Royal Commission on the Law of Insanity as a Defence in Criminal Cases"	611
II.	Insan	ity as a Defence	612
	Proble	em	612
	M'Nagh	nten's Case	615
	<u>R. v.</u>	Simpson	619
	Cooper	r v. R.	620
	<u>R. v.</u>	Windle	621
	R. v.	Codere	623
		ot from "Report of the Royal Commission on the Law sanity as a Defence in Criminal Cases"	624
	Schwar	ctz v. R.	632
	Cooper	c v. R.	637
	<u>R. v.</u>	Kjeldsen	639
	<u>R. v.</u>	Simpson	639
	<u>R. v.</u>	Abbey	639
	<u>R. v.</u>	Kirkby	642
	-	ot from "L.R.C. Working Paper 29, Criminal Law, The al Part: Liability and Defences"	644
	Excer	ot from "L.R.C. Report 31, Recodifying Criminal Law"	644
III.	Alter	natives to M'Naghten	645
	Durhan	n v. United States	645
	Excer	ot from "A.L.I. Model Penal Code"	648

xvii

		Brawner	648
		Excerpt from "New York Revised Penal Law"	652
		Excerpt from "Insanity Defence Reform Act of 1984"	652
		Excerpt from "Abolish the Insanity Defence - Why Not?"	652
		Excerpt from article by Alan Dershowitz	652
	IV.	Form of Expert Testimony	655
		Bleta v. R.	655
14		AUTOMATISM	659
		Problem	659
			659
		R. v. Hartridge	
	I.	Conviction for Causing Death	660
		Fain v. Commonwealth of Kentucky	660
		Excerpt from "The Toronto Star"	663
		R. v. Shaw	664
	II.	Proving Automatism	665
		Hill v. Baxter	665
	III.	Relation to Insanity	668
		R. v. Charlson	668
		R. v. Kemp	671
		R. v. Quick	672
		R. v. Bailey	675
		R. v. Sullivan	675
		R. v. Hartridge	676
		R. v. Revelle	677
		<u>R. v. K</u>	677

xviii

		Rabey V. R.	682
		Excerpt from "L.R.C. Report 31, Recodifying Criminal Law"	688
	IV.	Provocation	689
		Salamon v. R.	689
		Bedder v. D.P.P.	692
		D.P.P. v. Camplin	695
		R. v. Hill	696
		R. v. Galgay	701
		R. v. Cunningham	702
		R. v. Nealy	703
L5		SOME ASPECTS OF EXCUSABLE CONDUCT: NECESSITY, DURESS, AND SELF-DEFENCE	705
	I.	Necessity	705
		United States v. Holmes	705
		R. v. Dudley and Stephens	711
		Morgentaler v. R. (1975)	715
		Perka v. R.	720
		R. v. Morgentaler (1985)	725
		Excerpt from "A.L.I. Model Penal Code"	726
		Excerpt from "L.R.C. Report 31, Recodifying Criminal Law"	726
	II.	Duress	727
		Excerpt from "Criminal Code"	727
		Excerpt from "A.L.I. Model Penal Code"	728
		R. v. Carker	728
		R. v. Hudson and Taylor	732

		1011 I Soli and requeen	/33
		Abbott v. R.	734
		R. v. Howe	736
		Excerpt from "English Law Commission Working Paper No. 55"	737
		Excerpt from "L.R.C. Report 31, Recodifying Criminal Law"	737
	III.	Self-Defence	738
		Brown v. United States	738
		R. v. Reilly	739
		Brisson v. R.	739
		R. v. Faid	740
		R. v. Ebsary	741
		People v. Goetz	743
		Excerpt from "A Crime of Self-Defense"	745
		Beckford v. R.	747
		Excerpt from "Criminal Code"	748
		Excerpt from "L.R.C. Report 31, Recodifying Criminal Law"	749
16		DOUBLE JEOPARDY	750
		Excerpt from the "Charter of Rights and Freedoms"	750
		Green v. United States	750
		R. v. Shubley	751
	I.	Early Termination	753
		R. v. Karpinsky	753
		R. v. T.C.D.	755
		Re Parkin and The Queen	756
		R. v. Moore	757

II.	When Will a Dismissal be a Bar?	759
	R. v. Riddle	759
	Petersen v. R.	762
	R. v. Conrad	763
	R. v. Tateham	763
III.	The Special Pleas	764
	R. v. Barron	764
	R. v. Rinnie	766
	Luckett v. R.	768
IV.	Issue Estoppel	769
	R. v. Carlson	769
	R. v. Feeley, McDermott and Wright	775
	R. v. Gushue (1973)	776
	R. v. Gushue (1976)	778
	<u>Gushue v. R.</u> (1979)	781
	Grdic v. R.	783
	R. v. Segal	784
	R. v. Elmosri	784
	R. v. McShannock	785
V.	Splitting a Case	786
	Connelly v. D.P.P.	786
	R. v. Osborn	790
	Rourke v. R.	791
	R. v. Jewitt	793
	R. v. B.	795

xxi

	• 4.	That cliple conviccions	191
		<u>Kienapple v. R.</u>	797
		Côté v. R.	797
		Sheppe v. R.	798
		R. v. Hagenlocher	798
		Krug v. R.	798
		R. v. Prince	799
		R. v. Wigman	801
	VII.	Appeals and New Trials	802
		Excerpt from "Report of the Departmental Committee on New Trials in Criminal cases"	802
		Vezeau v. R.	803
		R. v. Morin	804
		Hill v. R.	805
		Guillemette v. R.	805
		R. v. Century 21 Ramos Realty	805
	VIII.	Problems in a Divided Jurisdiction	807
		R. v. Kissick	807
		United States v. Lanza	809
		Abbate v. United States	809
		Bartkus v. Illinois	810
17		SENTENCING	811
	I.	Problems	811
	II.	Cases on Sentencing	813
		R. v. Pearce	813

xxii

	R. v. Healey	816
	R. v. Hinch and Salanski	818
	R. v. Sumarah	824
	R. v. Morrisette	828
	R. v. Sandercock	832
	Prototype Sentencing Guideline	836
	R. v. Ebsary	840
	R. v. Gardiner	842
	Re B.C. Motor Vehicles	844
	R. v. Smith	846
	R. v. Mitchell	848
	R. V. Lyons	848
	R. v. Milne	849
	R. v. Zelensky	850
	R. v. Wilcox	851
	R. v. Hebb	853
	R. v. Fireman	857
	R. v. Naquitaruik	860
III.	Readings in Sentencing Policy and Reform	864
	Excerpt from the Report of the Canadian Sentencing Commission	864